CAPTIVE INSURANCE COMPANIES ASSOCIATION®

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July 11, 2017

U.S. Environmental Protection Agency
Office of Resource Conservation and Recovery
1200 Pennsylvania Avenue, NW (5305P)
Washington, DC 20460

Re: Docket ID No. EPA-HQ-SFUND-2015-0781; Proposed Rule: Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry

Dear Sir or Madam:

Please accept these comments of the Captive Insurance Companies Association ("CICA") on the EPA's proposed rule regarding Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry.

CICA is the largest domicile-neutral trade association for captive insurance. CICA has members from both U.S. and non-U.S. domiciles. Formed in 1972, CICA supports, and advocates for, the captive insurance industry.

The proposed rule would establish requirements under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for demonstrating financial responsibility on the part of owners and operators of hardrock mining facilities consistent with the risks associated with their handling of hazardous materials.

The EPA requests comment on whether to allow owners and operators to demonstrate financial responsibility by obtaining insurance from a captive insurer or risk retention group.[1] For the reasons discussed below, CICA believes it would be prudent and reasonable for the EPA to permit the use of insurance provided by a captive or risk retention group to demonstrate financial responsibility, especially if the insurer maintains a financial strength rating of "secure" from a nationally recognized rating agency.

Captive insurers and risk retention groups play an important role in risk management and financing for their owners. There is no reasonable basis to exclude captives and risk retention groups from the various methods owners and operators may use to demonstrate financial responsibility.

[1] Note that some risk retention groups are formed and licensed as traditional or "commercial" insurers rather than captives. We assume the EPA uses the term "risk retention group" to mean risk retention groups formed as a captive insurer and use the term in the same way in this letter.

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The financial condition of captive insurers and risk retention groups is subject to rigorous review and oversight by state insurance regulators in their states of domicile commensurate with the regulatory oversight received by traditional insurers. Captives and risk retention groups are subject to careful scrutiny by the domestic regulator before they are licensed to ensure they will be financially stable. After licensing, captives and risk retention groups must file a detailed annual financial report with their regulator audited by an independent auditor approved by the regulator. They also must file an annual actuarial opinion certifying the adequacy of their loss reserves, which must be prepared by a qualified actuary approved by the regulator. In addition, captives and risk retention groups undergo periodic regulatory examinations. Captives and risk retention groups that are rated by A.M. Best, Demotech or another rating agency undergo additional scrutiny to ensure they are capable of meeting their financial obligations to policyholders.

The EPA's concern that pure captive insurers may lack financial independence from their parent company is unfounded. Captives and risk retention groups may not engage in transactions that could affect their financial condition, such as loan-backs, the payment of dividends, changes in operations or changes in coverage, without prior regulatory approval. Significantly, a pure captive is bankruptcy-remote from its parent and affiliates. Thus, the assets of the captive are not affected by the financial condition of the parent company or any affiliated company in its corporate group and cannot be distributed to the parent without approval of the captive's regulator.

The EPA's concern that captives and risk retention groups may lack sufficient risk distribution and therefore be unable to cover catastrophic losses also is unjustified. In assessing the financial stability of captives and risk retention groups, regulators take into account the possibility that one or more catastrophic losses could stress the insurer's loss reserves and surplus and therefore require the insurer to maintain appropriate safeguards against such a loss. Captives and risk retention groups typically limit their exposure to catastrophic risks by establishing appropriate limits on the insurance they provide, obtaining excess of loss reinsurance, or both.

Captive insurance aligns the interests of the insurer and the insured. In the event of a loss, the captive is less likely to resist payment based on questionable policy interpretations or alleged noncompliance with procedural requirements, as sometimes happens with commercial insurance. Thus, a captive insurer is likely to make funds available more quickly if a loss occurs, expediting clean-up and remediation.

Finally, as mentioned above, one of the principal benefits of captives and risk retention groups is the stability they provide for the availability of coverage. Commercial insurers, banks and sureties are subject to a variety of financial pressures and may suffer financial setbacks or, for business reasons, exit the market for financial assurance coverage, as some have done. Captives and risk retention groups are a more stable source of financial assurance because their interests and goals are closely aligned with those of their owner/insureds, but at the same time they are bankruptcy remote from their owners.

In sum, captives and risk retention groups are well regulated entities which are designed to serve the interests of their owner/insureds. Rather than seeking to exclude captives and risk retention groups as a class of entities, the EPA would be better served by requiring all insurers providing financial responsibility under CERCLA Section 108(b) to meet established standards regarding capitalization, premium to surplus ratios, etc. as are required by standards promulgated by the National Association of Insurance Commissioners. Qualified rating agencies for insurers incorporate many of these same tests, in addition to their own. Obtaining a secure rating from one of these rating agencies would be a much more accurate determinant of financial responsibility than arbitrarily excluding either captives or risk retention groups.

Thank you for your attention to these comments.

Sincerely,

Dan Towle

Daniel D. Towle
President